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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1022

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,

Petitioner,

—against—

ORION SHIPPING & TRADING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review that part of its judgment entered on February 25, 1963, which affirms the judgment of the United States District Court for the Southern District of New York in favor of Orion Shipping & Trading Co., Inc. and against Eastern States Petroleum Corporation of Panama, S.A. in the sum of $1,079,983.01.

Opinion Below

The opinion of the Court of Appeals which affirmed the District Court is reported at 312 Fed. Rep. 2nd 299. A copy of the opinion is contained in the appendix hereto, at pp. App. 16 to App. 21.

The opinion of the District Court (449a to 459a) is reported at 206 Fed. Supp. 777. A copy of the opinion is contained in the appendix at pp. App. 3 to App. 15.

Jurisdiction of This Court

The decision of the Court of Appeals (Second Circuit), affirming the judgment of the District Court modifying the Award of the arbitration, is dated January 18, 1963.

By orders dated February 25, 1963, entered on February 25, 1963, the Court of Appeals denied the petition of Orion Shipping & Trading Co., Inc. for a rehearing and for a rehearing by the Court, *en banc*, of that part of the judgment of the Court of Appeals which affirmed the District Court's action vacating the Arbitrator's Award against Signal Oil and Gas Company.

Petitioners have not applied for any extension of time to petition for certiorari.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1254(1).

Questions Presented

May an Arbitrator refuse to require proof that damage was actually sustained and instead apply his own concept of due process by use of his own formula, which has no relevance to the facts of the case, and then award about one million dollars for an alleged breach of a contract?

May a District Court sanction such a departure from the accepted and usual concept of due process in judicial proceedings and confirm such award in the absence of proof of damage?

Statutes Involved

The statutes involved are Sections 10 and 11 of Title 9, U.S.C.A., the Federal Arbitration Act, and the Fifth Amendment of the Constitution of the United States, the pertinent parts of which are printed in the appendix hereto, at pp. App. 1 & 2.

Statement

On October 8, 1954, Eastern States Petroleum Corporation of Panama, S.A. (hereinafter referred to as "Eastern Panama") contracted with Orion Shipping & Trading Co., Inc. (hereinafter referred to as "Orion"),* to transport 10,500 barrels of crude oil per day over a five year period beginning April 1, 1955 and ending March 31, 1960, from Mena al

* Orion purported to act as an agent for an undisclosed principal.

Ahmadi in the Persian Gulf to a refinery at Houston, Texas, owned by Eastern States Petroleum and Chemical Corporation (hereinafter referred to as "Eastern American").

Eastern Panama, a wholly owned subsidiary of Eastern American, also signed with Eastern American a simultaneous transportation contract to transport the same oil for Eastern American, between the same ports.

At Orion's insistance, Eastern American signed a letter guaranteeing Eastern Panama's performance of the contract with Orion.

On March 10, 1959, mandatory controls were placed upon the importation of foreign crude oil by the President of the United States. The amount of foreign crude oil which Eastern American could import on all of its contracts was reduced by half, i.e., from 27,000 barrels per day to 11,810 barrels per day.

Eastern American had unsuccessfully applied to the Oil Import Control Appeals Board at Washington, D.C. for an increased import quota, and unsuccessfully sought to enjoin the Collector of Customs at Houston, Texas from restricting the importation of foreign crude oil.

On April 6, 1959, Eastern Panama and Orion modified the contract of October 8, 1954, by extending the termination date of the contract from March 31, 1960 for one year to March 31, 1961, and by spreading over the two year period the amount of oil to be carried during the final year of the original contract, and by amending the rate.

However, the net result of Eastern American's failure to obtain relief from the governmental restrictions placed upon its importation of crude oil and for an enlargement of the quota, was to drive the company well along the road to economic collapse.

On September 3, 1959, Eastern American was acquired by Signal Oil and Gas Company (hereinafter referred to as "Signal").

Adequate quantities of foreign crude oil could no longer be imported, and the transportation contracted for was far in excess of the needs of Eastern Panama and Eastern American, and both the contract between Eastern American (Signal) and Eastern Panama, and the contract between Eastern Panama and Orion were frustrated.

On September 29, 1959, Eastern Panama terminated the contract with Orion.

On October 7, 1959, Orion filed a libel in admiralty against Eastern Panama for a breach of the contract of affreightment, and against Signal under the alleged contract of guarantee. In due course, an order directing Eastern Panama to arbitrate was entered and affirmed on appeal (281 F. 2d 119).

From the outset, Signal was excluded from the arbitration: first by stipulation of counsel for the parties (251, 245-246R); then by Orion's counsel on the motion to compel arbitration (149-182R); then by the United States District Court for the Southern District of New York in directing arbitration (255-259R); then by the Court of Appeals for the Second

Circuit in affirming such order (284 F. 2d 419); and finally by counsel for the parties during the testimony before the Arbitrator (317A).

The Arbitrator made an award which, with interest, exceeded one million dollars against Eastern Panama for breach of the contract, and against Signal on the guarantee.

The Arbitrator rejected Eastern Panama's demand that Orion prove damage based on its cost of performance and its ability to perform the contract over the balance of the eighteen month term.

The Arbitrator treated these elements of damage as immaterial.

> "Whatever the risks shouldered by the Owners [Orion]; *whatever their profits or their losses might be;* whatever the extent and nature of the exigencies confronting them in the course of performance; whether they have made a good or a bad contract—all such matters obviously were none of the business, concern or interests of the Charterers." (Emphasis added) (Arbitration Award, 78A)

The District Court confirmed the Award in favor of Orion, against Eastern Panama. It vacated the Award with respect to Signal, on the grounds that the Arbitrator had exceeded his powers and made an award on a matter not submitted to him.

The Court of Appeals has affirmed the Award, as modified.

Reasons for Granting Writ

The Award against Eastern Panama amounted to $988,081.98, with interest. While the Award was made as damages, the Arbitrator arbitrarily excluded, as immaterial and irrelevant, evidence of Orion's cost of performance in arriving at the amount of the damages, and neither required nor received any evidence of Orion's ability to perform the contract over the balance of the eighteen month period.

> "Whatever the risks considered by the Owners; *whatever their profits or their losses might be*; whatever the extent and nature of the exigencies confronting them in the course of performance; whether they have made a good or a bad contract —all such matters obviously were none of the business, concern or interest of the Charterers." (Emphasis added.) (Award 78a)

Instead of taking proof of damages, the Arbitrator departed from the usual and accepted course of judicial proceeding by rejecting evidence of damages and applying his own notion of due process, which was the application of a formula. The formula would produce the same damage figure regardless of Orion's cost of performance or its ability to perform, i.e., the Arbitrator simply multiplied the number of barrels of oil to be delivered over the remaining eighteen months of the contract by the difference between a "market rate" which he found on the date of termination of the contract and the contract rate.

But the so-called "market rate" was mythical.[4] It was based on letters of foreign brokers which said substantially that the rate of U.S.M.C. minus 75¢ was

"available to owners" on the date of the termination, and that charterers "were willing to charter" at that rate. The Arbitrator arrived at a "market rate" of U.S.M.C. rates, minus 72½%, and even at that rate, there was no evidence that a vessel had been fixed, much less fixed for an eighteen months period over which the contract had to run.

The iniquity of this procedure is borne out by two cases in which the formula would produce the same result.

If Orion's cost of performance under the Eastern Panama contract, either by using its own vessels or by using time-chartered vessels, was higher than the total compensation paid by Eastern Panama to Orion, the termination of the contract would not cause damage to Orion, but instead relieve Orion of a loss-producing burden.

> (In this connection, Stambolis, Orion's chartering man, testified that Orion lost substantial sums on certain vessels utilized under the contract. (333a-334a)).

On the other hand, if Orion's total cost of performing the contract was less than the total compensation paid by Eastern Panama, the termination of the contract would produce damage to Orion, the amount of which would be determined by the difference between the cost to Orion of performing the contract and the contract price.

A formula which produces the same answer in the above two cases should not be enforced by the Federal Court, does not reflect damages as that term is

comprehended when parties make agreements, is arbitrary and a non-sequitur.

The element of cost to Orion has never been proven in this proceeding, and evidence with respect thereto was rejected by the Arbitrator as immaterial. Neither was there evidence of Orion's, or its principal's, ability to perform.

At first the Arbitrator had indicated his intention to require the evidence. Then he abruptly changed his mind. (312a, 313a, 78a).

> "* * * I am of the considered opinion that no particular need arises for the appearance of Mr. B. Goulandris for the more fully disclosed purposes and ends proposed by counsel for Eastern, for the following reasons:
>
> "1. Without intending to have it appear that I have in any way prejudiced what has thus far been presented before me, I have, nonetheless, concluded that no particular right attaches to Eastern to delve into the manner or means by which Orion performed its obligation under this particular and unique 'Contract of Affreightment' * * *
>
> * * * * * *
>
> "3. Finally, I cannot avoid the feeling that to authorize the kind of pursuit proposed by Eastern which I now decide as being too remote, if not completely irrelevant insofar as the basic issues are concerned would only serve to prolong these proceedings far beyond the point I consider as necessary or desirable, in justice to all concerned."

This Court has pointed out that an Arbitrator must look to the agreement between parties as a basis for

making an award and does not sit to dispense his own brand of justice.

In *United Steel Workers* v. *Enterprise Corp.*, 363 U.S. 593, (1960), Mr. Justice Douglas wrote:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.
>
> * * * *
>
> "Nevertheless, *an arbitrator * * * does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity *to this obligation, courts have no choice but to refuse enforcement of the award.*" (Emphasis supplied.)

The arbitrary use of the formula in this case obviated not only the necessity of proving damages, but enabled Orion, an agent for his undisclosed principal, to recover a substantial sum in its own right, without proving its or its principal's loss or ability to perform.

In *Anthony P. Miller, Inc.* v. *Wilmington Housing Authority*, 179 F. Supp. 199 (D.C. Del. 1959) a dispute arose over a construction contract which provided that a contracting officer would make final and conclusive findings of fact. One dispute involved the length of delay with which the contractor was chargeable and the

damages resulting therefrom. The contracting officer made his findings which the plaintiff rejected.

Plaintiff's theory was, as the Court said at page 201:

> "Plaintiff alleges that defendant is wrongfully withholding this sum of $23,828, arguing that no such damages for delay are lawfully chargeable to plaintiff because the contracting officer, in making his determination of excusable delay attributable to labor shortages, *applied a formula which was entirely inappropriate and erroneous for such calculation, the result of which amounts to gross error as to constitute constructive fraud.*"

Both parties moved for summary judgment and the Court held, at page 202:

> "Nor is it necessary, in order for the Courts to set aside such a decision, opinion or finding, that the conduct of the arbiter amount to actual fraud. A *finding of constructive fraud is sufficient.* Thus, the finding or decision will be set aside if the decision was fraudulent or was induced by such inattention or indifference as to imply bad faith. American Surety Co. v. Kinnear Mfg. Co., 185 Ark. 959, 50 S.W. 2d 986; or the decision was so arbitrary and grossly erroneous as to constitute bad faith. Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739; or, there is proof of constructive fraud or gross mistake of such a character as to amount to a palpable and substantial wrong. Edward Edinger Co. v. Willis, 260 Ill. App. 106." (Emphasis supplied.)

The Court concluded that plaintiff's objection was "well founded". The Court said, at page 203:

> "* * * The application of the so-called formula * * * was in my judgment a clear non-sequitur * * *"

p. 204:

> "It is unfortunate that a finding of constructive fraud must be made in so many words when, in fact, we are actually dealing with serious errors in calculations. However, the decisions refer to such miscalculations as constructive fraud and I find it necessary to pin that label upon the contracting officer's erroneous findings here although, actually, *there is no hint of bad faith, dishonesty or deliberate wrongful conduct upon the part of the contracting officer or the Authority.*" (Emphasis supplied.)

Provisions with respect to arbitration are being issued with increasing frequency, particularly in maritime contracts, and the extent to which an arbitrator may apply his own concept of due process becomes more and more important to contracting parties, in general, and should be delineated by this Court.

The Federal Arbitration Act was expressly intended to afford minimum standards of arbitral due process, not to provide a means for avoiding or eliminating it and permitting an arbitrator to substitute his own arbitrary concept.

The Arbitrator, in making the Award against Eastern Panama, and the courts in affirming it, have avoided affording Eastern Panama the basic elements of due process.

The true concept of damage, which is the essence of every agreement and, therefore, of due process, is properly defined as:

> "* * * money compensation, *to place you in the same position as respects your pocketbook as you would have occupied if no wrong had taken place.*" (Emphasis supplied.) (*McCormick on Damages*, sec. 44, p. 165.)
>
> "* * * A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made. *But though there must be evidence of substantial damage in order to justify recovery of more than a nominal* sum, the exact amount need not be shown. * * *" (Emphasis supplied.) (*Williston on Contracts*, sec. 1345.)
>
> "* * * The loss or injury actually sustained, rather than the price paid, or agreed to be paid, on full performance, is the proper measure of damages for a breach of contract." (13 *New York Jurisprudence*, section 39.)

It is submitted, therefore, that the Court should rule on the question of whether an arbitrator may substitute his own brand of justice and due process to the exclusion of the accepted, and usual course of judicial proceedings.

CONCLUSION

In view of these considerations, petitioners respectfully submit that this petition should be granted.

Respectfully submitted,

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Relevant Statutes

TITLE 9

Section 10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration——

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

Section 11

In either of the following cases the United States court in and for the district wherein the award was

made may make an order modifying or correcting the award upon the application of any party to the arbitration——

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. July 30, 1947, c. 392, § 1, 61 Stat. 669.

CONSTITUTION OF THE UNITED STATES

Amendment V

"No person shall . . . be deprived of . . . property, without due process of law . . ."

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 199–179

ORION SHIPPING & TRADING CO., INC.,

Libelant,

—against—

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A., EASTERN STATES PETROLEUM AND CHEMICAL CORPORATION and SIGNAL OIL & GAS COMPANY,

Respondents.

APPEARANCES:

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DAWSON, *D. J.*:

This is a motion by the libelant, Orion Shipping & Trading Co., Inc. (hereinafter called Orion) for an

order under a provision of the United States Arbitration Act, 9 U.S.C. §9, confirming an arbitration award in favor of Orion against Eastern States Petroleum Corporation of Panama, S.A. (hereinafter called Eastern Panama) and Signal Oil & Gas Company (hereinafter called Signal), or in the alternative, modifying the award as to Signal and confirming it as to Eastern Panama. The respondents Eastern Panama and Signal have filed a cross-motion to vacate or modify the award of the arbitrator on the grounds, *inter alia*, that the award in the sum of $988,081.98, together with interest, is arbitrary and grossly excessive, that the arbitrator committed misconduct in his computation of the damages and in including Signal in his award, and that the arbitrator exhibited evident partiality in favor of Orion and against Eastern Panama and Signal.

Background of the Arbitration

In the latter part of October 1954, Orion and Eastern Panama entered into a Contract of Affreightment (herinafter called the Contract), dated as of October 8, 1954, under which Eastern Panama agreed to furnish and Orion agreed to transport an average of 10,500 barrels of crude oil per day from the Persian Gulf and other areas to a refinery at Houston, Texas, owned and operated by Eastern Panama's parent corporation, Eastern States Petroleum and Chemical Corporation (hereinafter called Eastern American).[1] At the request of Orion, Eastern American which had participated in the preliminary negotiations for the

[1] As of the time when the Contract was signed Eastern American was known as Eastern States Petroleum Company, Inc.

Contract, issued a letter guaranteeing performance of the Contract by Eastern Panama. Eastern American was subsequently merged into Signal.

The Contract was initially to be in effect for a period of five years beginning April 1, 1955, terminating on March 31, 1960 and was later extended to March 1961.

On March 10, 1959, the President of the United States promulgated mandatory oil import quotas on the importation of crude oil into the United States. On September 29, 1959, Eastern Panama notified Orion of its decision to terminate the Contract on the ground that as a result of the imposition of the oil import quota the purpose of the Contract was frustrated.

The Contract contained an arbitration clause and pursuant to an order of this court on March 3, 1960, Eastern Panama was directed to proceed to arbitration with Orion to determine the validity of the termination and to ascertain the damages to Orion, if any. The order compelling Eastern Panama to arbitrate was affirmed by the Court of Appeals. *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corporation of Panama, S.A.*, 284 F.2d 419 (2d Cir. 1960).

Hearings were held before the sole arbitrator, Admiral Edmond J. Moran, during the period from July to November 1961. On February 13, 1962 the arbitrator rejected the defense of frustration and rendered a written award (hereinafter called the Award) in favor of Orion in the sum of $988,081.98, together with interest. The Award provided for payment of the amount awarded "by the Eastern States Petroleum Corporation of Panama, S.A., or, as the situation

requires, by their guarantors, in person of Signal Oil & Gas Company, as the surviving corporation of the merger between the latter and the said guarantors, in person of Eastern States Petroleum & Chemical Corporation. . . ."

Validity of the Award as Against Eastern Panama

The respondents urge that the Award should be vacated for the following reasons:

1. That the sum awarded of $988,081.98, together with interest, is arbitrary, grossly excessive and being totally unsupported by any evidence constitutes legal fraud on Eastern Panama.

2. That the arbitrator committed misconduct in refusing to hear testimony material to the question of damages and in making an award without receiving any credible proof that any damage was actually sustained.

3. That the arbitrator exhibited evident partiality in favor of Orion against Eastern Panama and Signal by rejecting all the contentions of Eastern Panama and Signal and accepting all contentions of Orion.

4. That the arbitrator imperfectly executed his powers in that he failed to allow respondent Eastern Panama the amount of the address commission which Orion conceded Eastern Panama was entitled to receive.[2]

---

[2] In addition to the above four grounds, Signal urges that the Award should be vacated as to it because it was not a party to the arbitration proceedings and the arbitrator exceeded his powers in including Signal in the Award. This latter argument will be considered in a subsequent section of this opinion.

Opinion of District Court

The nature and extent of federal court review of arbitration awards is strictly limited by statute.[3] The statutory provisions do not permit a review de novo, nor will an award be vacated on the grounds of erroneous findings of fact or of misinterpretations of law.

> "Were we empowered to view the matter *de novo*, we would find much to persuade in the arguments advanced by the dissenting arbitrator. But as respondent recognizes, the court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§ 10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do

[3] Section 10 of the Arbitration Act (9 U.S.C. § 10) provides:

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

not authorize its setting aside on the grounds of erroneous finding of fact or of misinterpretation of law. . . ." *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960).

The reasoning used by the Court of Appeals in the *Amicizia* case was expressed over 100 years ago by the United States Supreme Court in *Burchell* v. *Marsh*, 17 How. 344, 15 L. Ed. 96, 99 (1854) as follows:

> "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. . . ."
>
> "Courts should be careful to avoid a wrong use of the word 'mistake', and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. . . ."

The moving papers fail to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award against Eastern Panama.

Opinion of District Court

The principal complaint by the respondents relates to the arbitrator's computation of damages. The Court finds no misconduct or partiality on the part of the arbitrator. He apparently performed his duties carefully, impartially and with a great deal of patience and thoughtfulness.

Basically the arbitrator computed the amount of damages by taking the difference between what he determined to be the tanker market rate on the day of termination of the Contract and the contract rate, multiplied by the number of barrels of oil remaining to be shipped on the termination date, plus an amount of damages, at the same rate, for some optional quantities of barrels which Orion might have elected to transport under the Contract. Eastern Panama contends that the arbitrator should have taken evidence as to Orion's costs of performing the Contract, to determine whether the Contract would have yielded a profit, and to determine whether the termination actually resulted in damage to Orion.

The contention of Eastern Panama that the actual cost of performing the Contract should have been taken into consideration was carefully considered by the arbitrator in reaching his decision to apply the market rate as the subtrahend in determining the amount of damages to be awarded. The conclusion of the arbitrator not to consider actual cost is in accordance with the general method of computing damages where damage is ordinarily determined by deducting the market value from the contract price. Actual cost in such case is usually irrelevant. *McCormick, Damages*, §44, 46.

It is true that the arbitrator did not apply the rule of damages followed in cases involving a breach by the

charterer of a single ship. The rule in such a case "is that the shipowner is entitled to the net amount that would have been earned under the charter sued on, less the net amount actually earned, or which could with reasonable diligence have been earned during the time required in the voyage named in the charter." *Ainesworth Coal & Iron Co.* v. *Grangesberg Oxelosund*, 287 Fed. 291, 296 (4th Cir. 1923); *Aaby* v. *States Marine Corp.*, 107 F. Supp. 484, 486 (S.D.N.Y. 1951); *Cargo Ships El Yam* v. *Stearns & Foster Co.*, 149 F. Supp. 754, 765 (S.D.N.Y. 1955). Implicit in this test is a determination of the shipowner's costs of operation.

The contract involved in this action, however, was not a charter party for the charter of a single ship or even of particular ships. It was a contract of affreightment for the carriage of petroleum products from a foreign port to Houston, Texas. By the terms of the contract Orion was to supply vessels and Eastern Panama was to provide petroleum products. There was no designation of the particular vessels to be employed. They could have been "nominated without restriction of flag." Orion could have used its own ships, it could have chartered other ships or made any other arrangements necessary for the transportation. It is well recognized that there is a standard market rate for tankers for the transportation of petroleum products, which rate varies from time to time. When the contract with Orion was cancelled on September 29, 1959, the contract required Orion to transport at rates varying from USMC minus 32½% to USMC minus 65%, but on that date the tanker market rate for a contract of affreightment similar to the Orion contract was

USMC minus 75%. The arbitrator therefore decided that the measure of damages to Orion was the difference between the contract rate at the date of termination and the tanker market rate at that date and computed the damages on this basis. As a result of using this method of determination it became unnecessary to determine the costs of operation of Orion either at or after the date of wrongful termination of the contract. The arbitrator let the parties put in any evidence they desired in connection with the issue before him. He refused, however, to compel Orion to produce books of account to show the costs of operation before and after termination of the Contract on the ground that such costs would be irrelevant.

It cannot be said that the arbitrator was guilty of fraud or misconduct in selecting the method of computing damages that he did. At the very most the arbitrator's method of computation was an error in interpretation of law and it is well settled that this is insufficient ground for refusing to confirm his Award. *Wilko* v. *Swan*, 346 U.S. 427, 436-37 (1953); *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957). Any refusal to require the libelant to produce certain records was not a refusal to receive relevant evidence on the merits of the controversy, but was an exclusion based on the arbitrator's considered conclusion that a determination of the cost of performing the contract was irrelevant. For this Court to refuse to confirm the Award on the ground that the arbitrator refused to take pertinent evidence relevant to the issue of damages would in effect be forcing on the arbitrator its own conclusion as to the correct method of computation of damages.

and this is not proper under the statute. See, *Wilko v. Swan, supra; A. D. Juilliard & Co. v. Baitch & Castaldi, Inc.*, 152 N.Y.S. 2d 394 (Sup. Ct. 1956).

In this very case the Court of Appeals has pointed out that it is not for the court to instruct an arbitrator how to compute damages. See, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corporation of Panama, S.A.*, 284 F. 2d 419, 421 (2d Cir. 1960).[4]

The additional claim of the respondents that the arbitrator erred in not providing for an address commission payable to Eastern Panama is insufficient ground for setting aside or modifying the Award inasmuch as the Contract did not provide for an address commission and the only party entitled to claim commissions under its terms is the chartering brokerage firm of Charles R. Weber Co. If, as alleged, the respondents have an agreement with Charles R. Weber Co. to a part of the commission they may claim this part from them upon payment of the amount of the Award.

The Award as against Eastern Panama must therefore be confirmed.

Validity of the Award as Against Signal

As previously noted, the Award provided for payment by Eastern Panama or "as the situation requires, by their guarantors, in the person of Signal

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[4] "Appellant also urged that if arbitration should be ordered without summary trial, the court should instruct the arbitrators how to compute Orion's damages. It is not surprising that this contention finds no judicial support, since, if accepted, it would result in a serious curtailment of the arbitrator's function, a function which, once arbitration is chosen by the parties, should not be encroached upon by the courts." 284 F. 2d at p. 421.

Oil & Gas Company. . . .". Signal was not a signatory to the Contract which embodied the arbitration provision, nor was Signal directed to be a party to the arbitration by the order of this court which commanded that the arbitration be carried out. Orion contends, nevertheless, that the award of collateral liability as against Signal should be enforced for the following reasons:

1. Eastern American, Signal's predecessor, may be considered a party to the Contract although it was not a signatory.

2. Eastern American's conduct during the performance of the Contract indicated that it was the real party in interest.

3. Eastern American exercised complete dominion over Eastern Panama.

4. Signal is estopped from denying it is bound by the arbitration award because of its inconsistent position in previous litigations when it relied on the Contract as its own; and

5. Signal assumed the defense of the arbitration proceeding and interposed defenses personal to it.

It is unnecessary to go into each of these arguments in detail. All of them are based on the underlying premise that Eastern Panama functioned as an instrumentality of Eastern American and hence, of Signal. In many respects Orion's characterization of the relationship between Eastern Panama and Eastern American cannot be disputed. It is clear that Eastern American exercised very substantial control

over Eastern Panama, that the officers and directors of the two corporations were almost identical, that the Contract benefitted Eastern American and was in part carried out by it, and that the defense of the arbitration proceeding was in effect undertaken by Signal. All of these factors, however, are insufficient to justify the arbitrator's conclusion that Signal, as the successor of Eastern American, should be held secondarily liable for the amount of the Award. The arbitrator was limited in his functions by the order of the court which directed that the arbitration proceed. This order directed that the arbitration proceed as between Orion and Eastern Panama and included no other party. The arbitrator had no power to subject another party to the terms of the Award, regardless of what he found to be the relationship of that party to the party who was subject to his jurisdiction.

Title 9, U.S.C. § 10(d) provides that a United States District Court may vacate an arbitration award "where the arbitrators exceeded their powers" and § 11 of the same title provides that an award may be modified "where the arbitrators have awarded upon a matter not submitted to them. . . ." The question of liability of Signal as guarantor of the Contract was not a matter submitted to the arbitrator. By including a determination on this matter in his Award the arbitrator exceeded his powers and awarded on a matter not submitted to him, and this provision of the Award must therefore be set aside. Even if Eastern American might have been ordered to submit to arbitration by a court, as an alter ego of Eastern Panama (see *Fisser* v. *International Bank*, 282 F. 2d 231 (2d

Cir. 1960); *Chilean Nitrate Sales Corp. v. The Nortuna*, 128 F. Supp. 934 (S.D.N.Y. 1955)), it was beyond the powers of the arbitrator to make such a decision. See *Brescia Const. Co. v. Walart Constr. Co.*, 238 App. Div. 45, 263 N.Y.S. 13 (1st Dep't 1933). The guarantee on which the arbitrator based his decision was not submitted in evidence at the arbitration proceedings and Signal had no opportunity to submit defenses to liability under the guarantee.

Of course, if Signal is liable as a guarantor of the Contract, as the arbitrator found, the libelant is free to initiate an action against it on the guarantee, if the amount of the Award cannot be recovered against Eastern Panama.

CONCLUSION

The Award of the arbitrator is modified to the extent of deleting from the Award the clause reading "or, as the situation requires, by their guarantors, in person of Signal Oil & Gas Company, as the surviving corporation of the merger between the latter and the said guarantors, in person of Eastern States Petroleum & Chemical Corporation.".

In all other respect the Award is confirmed.

So ordered.

Dated: New York, N. Y.
May 28, 1962.

ARCHIE O. DAWSON
U. S. D. J.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 188—October Term, 1962

(Argued January 8, 1963 Decided January 18, 1963)
Docket No. 27671

ORION SHIPPING & TRADING CO., INC.,
Libellant-Appellee-Appellant,

v.

EASTERN STATES PETROLEUM CORPORATION OF PANAMA, S.A.,
Respondent-Appellant,

and

EASTERN STATES PETROLEUM AND CHEMICAL CORPORATION and SIGNAL OIL & GAS COMPANY,
Respondents-Appellees.

Before:

CLARK, KAUFMAN and HAYS, *Circuit Judges.*

Cross appeals from an order and judgment of the District Court for the Southern District of New York, Archie O. Dawson, J., confirming as modified an arbitration award of damages for breach of contract.

Affirmed.

HEALY, BAILLIE & BURKE, New York, N. Y. (Raymond J. Burke and Thomas A. Dillon, Jr., of counsel), *for libellant-appellee-appellant.*

BIGHAM, ENGLAR, JONES & HOUSTON, New York, N. Y. (J. Joseph Noble and J. Bond Smith, Jr., of counsel), *for respondents-appellants-appellees.*

KAUFMAN, *Circuit Judge*:

Libellant Orion Shipping & Trading Co., Inc., entered into a contract of affreightment with one of the respondents, Eastern States Petroleum Corporation of Panama, S.A. (Eastern Panama), whereby Orion was to transport oil furnished by Eastern Panama from the Persian Gulf to Houston, Texas. Eastern Panama's obligations under the contract were guaranteed by its parent corporation, Eastern States Petroleum and Chemical Corporation, referred to here as Eastern American, and by Eastern American's successor corporation, Signal Oil & Gas Company. When Eastern Panama notified Orion of its decision to terminate the contract because of a presidential promulgation limiting the importation of crude oil into the United States, Orion secured an order, affirmed by this Court, 284 F. 2d 419 (1960), compelling Eastern Panama to submit to arbitration[1] the question of breach of contract and damages to Orion. Although it was clear that the liability of Eastern Panama only was to be determined by the arbitrator—such was the decision

[1] Special clause 14 of the contract of affreightment provided for arbitration, according to a prescribed procedure, of "any dispute arising during the execution of this Contract of Affreightment. • • •"

of this Court and the stipulation of the parties—and although Eastern American's (Signal's) guarantee was not submitted into evidence, the arbitrator determined not only that Eastern Panama was responsible for breach of contract to the extent of $988,081.98 plus interest, but also that Signal was liable on its guarantee if Eastern Panama were to default.

Eastern Panama's motion to vacate the award of damages on the ground that it was improperly calculated was correctly denied by Judge Dawson in the court below, for the reasons there stated. Not only has this Court already determined, on the first appeal, that the manner of computing damages was for the arbitrator and not for the courts, 284 F. 2d at 421, but the law is clear that an arbitration award based upon a misinterpretation of law or an insufficiency of supporting facts will not be overturned.[2] See *Wilko* v. *Swan*, 346 U. S. 427, 436-37 (1953); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960); *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F. R. D. 359, 362 (S. D. N. Y. 1957).

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[2] 9 U. S. C. § 10 sets down the circumstances in which an arbitration award may properly be vacated:

"(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final and definite award upon the subject matter submitted was not made."

Judge Dawson denied Orion's motion under section 9 of the United States Arbitration Act, 9 U.S.C. § 9, to confirm that portion of the arbitration award holding Signal liable as guarantor of Orion's contractual obligations. He held, properly we think, that the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding, and that Signal's motion to vacate the award against it should be granted. See 9 U.S.C. §§ 10(d), 11. A decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is not within the province of the arbitrator himself but only of the court. See *A/S Ganger Rolf* v. *Zealand Transportation Ltd.*, 191 F. Supp. 359, 363 (S.D.N.Y. 1961); *Brescia Construction Co.* v. *Walart Construction Co.*, 238 App. Div. 45, 263 N.Y.S. 13 (1st Dep't 1933); cf. *Fisser* v. *International Bank*, 282 F. 2d 231 (2d Cir. 1960).

Orion agrees that the arbitrator exceeded his powers in determining Signal's liability as guarantor. It also agrees that the question whether Signal should be bound by the arbitration award, although not formally a party to the arbitration clause, is to be determined by the courts and not by the arbitrator. It argues that the District Court, in an action to confirm the award against Eastern Panama, may adjudge Signal liable thereon since Eastern Panama is merely a "shell," while Signal, its "alter ego," is truly responsible for Eastern Panama's obligations. We are cited to *Fisser* v. *International Bank*, *supra*, where this Court held that a parent corporation, if so thor-

oughly in control of its subsidiary as to be deemed an "alter ego," could be ordered to *submit* to arbitration pursuant to a clause in its subsidiary's contract. See *Chilean Nitrate Sales Corp. v. The Nortuna*, 128 F. Supp. 934 (S. D. N. Y. 1955).

It may well be, as Judge Dawson indicated below, that Eastern Panama is thoroughly dominated by Signal, and that Signal is properly accountable on an "alter ego" theory. But we hold that an action for confirmation is not the proper time for a District Court to "pierce the corporate veil." The usual office of the confirmation action under 9 U. S. C. § 9 is simply to determine whether the arbitrator's award falls within the four corners of the dispute as submitted to him. This action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported "alter ego"? Our conclusion does not in any way impugn the soundness of the reasoning in the *Fisser* case, which arose in the quite distinguishable context of an action to *compel* arbitration under 9 U. S. C. § 4, rather than to confirm.

As Judge Dawson concluded, our holding does not preclude Orion from prosecuting its action, still pending, against Signal as guarantor of Eastern Panama's obligations. Nor does it preclude Orion from bringing a separate action against Signal to enforce the award against Eastern Panama, invoking the "alter ego" theory. But an action to confirm the arbitrator's

award cannot be employed as a substitute for either of these two quite distinct causes of action.

Orion also argues that Signal's conduct during the arbitration proceeding constituted a consent to arbitration which in turn gave the arbitrator power to render an award binding against it. It is asserted that Signal was in effect conducting the arbitration and interposing defenses personal to it alone, and that all witnesses, testimony, and documents emanated from Signal rather than Eastern Panama. Since much of the evidence which would have to be adduced to prove that Signal "consented" to a binding arbitration award would be congruent with the evidence adduced to prove that Signal is Eastern Panama's "alter ego," we hold for the same reasons that it is inappropriate for the District Court to dispose of this argument in an action to confirm.

We therefore affirm the judgment below confirming the arbitrator's award as it applied to Eastern Panama and vacating the award as it applied to Signal.